

1
2
3
4
5

6 UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA
8 OAKLAND DIVISION

9
10 DAVID O. BACA,
11 Plaintiff,
12 vs.
13 STATE OF CALIFORNIA, DEPARTMENT
14 OF CALIFORNIA HIGHWAY PATROL,
15 SERGEANT GRIMES, SERGEANT TRUE,
16 OFFICER B. RODGERS, OFFICER M.
17 WILSON, OFFICER C. RANDALL,
18 OFFICER B. JEFFERS, OFFICER B.
19 PHILLIPS, and DOES 1-10,
20 Defendants.

Case No: C 13-02968 SBA

ORDER RE MOTIONS IN LIMINE

Dkt. 121, 122

21 Plaintiff David O. Baca brings the instant civil rights action, pursuant to 42 U.S.C.
22 § 1983, against various California Highway Patrol (“CHP”) officers and others, alleging
23 claims for excessive force and the illegal search of his vehicle. He also alleges a state law
24 claim for violation of his civil rights under California’s Bane Act, California Civil Code
25 § 52.1. A jury trial is presently scheduled to commence on April 11, 2016. Dkt. 108. In
26 anticipation of trial, the parties have filed motions in limine, which have been fully briefed
27 and are ripe for adjudication.¹

28
29

¹ The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

1 **I. INTRODUCTION**

2 **A. FACTUAL SUMMARY**

3 On the evening of June 15, 2011, Plaintiff was driving his vehicle along Interstate 80
 4 when CHP Officers B. Jeffers and B. Philips allegedly observed him speeding and weaving
 5 in traffic. The officers followed Plaintiff and activated their emergency lights to pull him
 6 over. Plaintiff exited at the Central Avenue offramp in El Cerrito, California, and stopped
 7 at a gas station. After Plaintiff exited his vehicle as instructed, Officer Jeffers drove
 8 Plaintiff's vehicle to a dark side street and allegedly searched the vehicle's interior without
 9 consent. Defendants contend that they performed nothing more than a permissible
 10 inventory search prior to having the vehicle towed away.

11 The officers conducted various Field Sobriety Tests ("FSTs") on Plaintiff.
 12 Defendants claim that Plaintiff failed the FSTs, though Plaintiff states that he was never
 13 informed by the officers that he had failed to perform the FSTs satisfactorily. After
 14 Plaintiff refused to take a breathalyzer test, he was arrested and taken to the CHP Office in
 15 Oakland.

16 At the CHP Office, the officers ordered Plaintiff to submit a blood sample, but he
 17 allegedly refused. Plaintiff denies that he declined the officers' request, and claims that he
 18 simply asked to speak with an attorney and whether less invasive options, such as a urine
 19 test, were available. Plaintiff further avers that the officers refused his requests and
 20 slammed his face to the floor, and, while he was still handcuffed, beat and kicked him
 21 repeatedly on his back, legs, arms and head. As one of officers pinned Plaintiff to the floor,
 22 Kenneth Simonson, a phlebotomist, extracted two blood samples from Plaintiff's left arm.²
 23 The officers admit restraining Plaintiff face down on the floor, but maintain that they only
 24 used reasonable force to facilitate the blood draw. The toxicology report prepared by

27

 28 ² In their trial brief, Defendants indicate that they intend to call Mr. Simonson as a witness, even though he has no recollection of performing a blood extraction on Plaintiff on the evening in question. Defs.' Trial Brief at 5, Dkt. 110.

1 Central Valley Toxicology, Inc. (“CVT”) indicates that Plaintiff’s blood alcohol level was
 2 0.11 percent. Defs.’ Am. Opp’n Ex. D, Dkt. 124-1.

3 Following the blood extraction, the officers took Plaintiff to a patrol car to transport
 4 him to the Alameda County Jail. According to Plaintiff, the officers then lifted him by his
 5 handcuffs and dragged him outside, causing extreme pain and injuring him further, and
 6 placed a hood over his head. The officers counter that Plaintiff was disruptive in the patrol
 7 car and spat on the officers. At the jail, Plaintiff was stripped of all clothing (except for the
 8 hood that had been placed on him) and placed naked for several hours in a holding cell.

9 On December 5, 2011, Plaintiff appeared in the Alameda County Superior Court in
 10 connection with the various charges arising from his drunk driving arrest. Pursuant to a
 11 plea agreement negotiated by his counsel, Plaintiff pled no contest to a misdemeanor
 12 violation of California Vehicle Code § 23152(b), which makes it “unlawful for a person
 13 who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.”
 14 According to the Clerk’s Minutes from that hearing, the parties stipulated that the police
 15 report provided a “factual basis for the plea.” Defs.’ Am. Opp’n Ex. A, Dkt. 124-1. The
 16 police report, however, has not been provided to the Court.

17 **B. PROCEDURAL HISTORY**

18 On June 3, 2013, Plaintiff filed the instant action in the Alameda County Superior
 19 Court. Defendant County of Alameda (which is no longer a party) removed the action
 20 based on federal question jurisdiction. Plaintiff subsequently filed a First Amended
 21 Complaint (“FAC”) against: the State of California; the Department of the CHP; Sergeant
 22 Grimes; Sergeant True; Officer B. Rodgers; Officer M. Wilson; Officer C. Randall; Officer
 23 Jeffers; and Officer Phillips. Dkt. 17. The FAC alleges three claims for relief:
 24 (1) unlawful search of Plaintiff’s vehicle as to the individual Defendants in violation of the
 25 Fourth Amendment; (2) excessive force as to all Defendants in violation of the Fourth
 26 Amendment; and (3) violation of Plaintiff’s civil rights under the Bane Act as to all
 27 Defendants.

28

1 On September 30, 2013, the Court adjudicated Defendants' motion to dismiss, which
 2 was directed to the first and third claims for relief. Dkt. 38. As to Plaintiff's first claim for
 3 the unlawful vehicle search, the Court dismissed all Defendants *except* Officers Jeffers and
 4 Phillips. With regard to his third claim for violation of the Bane Act, Plaintiff
 5 acknowledged that he had failed to exhaust his administrative remedies under the California
 6 Tort Claim Act and abandoned his claim for damages. The Court therefore granted
 7 Defendants' motion to dismiss Plaintiff's third claim to the extent it seeks the recovery of
 8 damages and denied the motion with respect to the request for injunctive relief.

9 **II. DISCUSSION**

10 **A. PLAINTIFF'S MOTIONS IN LIMINE**

11 **1. Blood Alcohol Level (Motion No. 1)**

12 Plaintiff moves to exclude evidence of his blood alcohol level, including any
 13 toxicological test results, on the ground that Defendants have not disclosed an expert
 14 witness qualified to testify regarding the "methods, procedures and adequacy of any such
 15 tests and/or results." Pl.'s Mot. at 1, Dkt. 122. As noted, the blood alcohol measurement
 16 was made by CVT, apparently a private laboratory used by the CHP. Defs.' Am. Opp'n
 17 Ex. D. Defendants' Witness List does not identify any individuals employed by CVT nor
 18 anyone who is qualified to render testimony regarding the testing process.³

19 To admit evidence of a driver's blood alcohol level, the proponent of such evidence
 20 must demonstrate "a basis for believing that the test which measured blood alcohol was
 21 reliable." Davenport v. Dep't of Motor Vehicles, 6 Cal.App.4th 133, 140 (1992). "[T]he
 22 foundational requirements for establishing the reliability of test results consist of a showing
 23 that (1) the apparatus utilized was in proper working order, (2) the test used was properly
 24

25 ³ Defendants' Witness List identifies eight CHP staff and the phlebotomist. Defs.'
 26 Witness List, Dkt. 113. Defendants state that Officer Jeffers and Phillips will "offer an
 27 opinion that based on their observations of Mr. Baca's objective signs and symptoms of
 28 intoxication and his poor performance of the Field Sobriety Tests" that he was driving
 under the influence of alcohol. Id. In addition, "all CHP witnesses will express an opinion
 of the amount of beer Mr. Baca would need to consume to achieve a blood ethyl alcohol
 level of 0.11 at the time his blood was drawn." Id.

1 administered, and (3) the operator was competent and qualified.” Id. Reliability of the test
 2 result generally must be established through expert testimony. Brown v. Williams, No.
 3 2:10-CV-00407-PMP, 2013 WL 5370749, at *31 (D. Nev. Sept. 24, 2013), aff’d, 597
 4 Fed.Appx. 417 (9th Cir. 2015) (finding that a toxicology report, “standing alone without
 5 expert testimony,” was insufficient to establish the level of drugs, if any, that was present).⁴

6 Here, Defendants contend that expert testimony is unnecessary because “[Plaintiff]
 7 already admitted that his [blood alcohol level] was 0.11 percent by virtue of his criminal
 8 plea agreement.” Defs.’ Am. Opp’n at 3, Dkt. 124. This contention lacks merit. As an
 9 initial matter, Defendants do not dispute Plaintiff’s contention that his misdemeanor “no
 10 contest” plea may not be used against him in this action. See Cahoon v. Governing Bd. of
 11 Ventura Unified School Dist., 171 Cal.App.4th 381, 384 (2009) (“[California] Penal Code
 12 section 1016(3) provides that a plea of nolo contendere to a misdemeanor ‘may not be used
 13 against the defendant as an admission in any civil suit based upon or growing out of the act
 14 upon which the criminal prosecution is based.’”). That aside, Plaintiff did not—as
 15 Defendants insist—admit that his blood alcohol level was 0.11 percent. Rather, he merely
 16 acknowledged that the police report provided a factual basis for the plea agreement.⁵ In
 17 addition, a statement in the police report regarding Plaintiff’s blood alcohol level is not
 18 independently admissible absent the requisite foundation to establish its reliability. See
 19 Davenport, 6 Cal.App.4th at 140.

20 Equally unconvincing is Defendants’ ancillary argument that, under Heck v.
 21 Humphrey, 512 U.S. 477 (1994), “excluding Mr. Baca’s [blood alcohol level] of 0.11 could
 22 improperly imply the invalidity of plaintiff’s DUI conviction which, in part, was based on
 23 his [blood alcohol level].” Defs.’ Am. Opp’n at 3. In Heck, the Supreme Court held that a
 24

25 ⁴ Under Federal Rule of Evidence 702, expert opinion testimony is appropriate if
 26 “scientific, technical, or other specialized knowledge will assist the trier of fact to
 understand the evidence or to determine a fact in issue.”

27 ⁵ At most, Plaintiff acknowledged that there was a factual basis for a finding that his
 28 blood alcohol level was 0.08 percent or greater—as required for violation of California
 Vehicle Code § 23152(b).

1 civil rights complaint under § 1983 cannot proceed when “a judgment in favor of the
 2 plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would,
 3 the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or
 4 sentence has already been invalidated.” 512 U.S. at 487. In this case, Heck is not
 5 implicated because Plaintiff’s claim of excessive force is based on events that are separate
 6 and apart from his offense conduct, which involved driving a vehicle while having a blood
 7 alcohol level of at least 0.08 percent. See Smith v. City of Hemet, 394 F.3d 689, 698 (9th
 8 Cir. 2005) (“Under Heck, Smith would be allowed to bring a § 1983 action, . . . if the use of
 9 excessive force occurred subsequent to the conduct on which his conviction was based.”).
 10 As for Plaintiff’s illegal search claim, there is no indication that evidence seized from that
 11 search, if any, was used to convict Plaintiff.⁶ Therefore, a successful judgment on that
 12 claim would not in any way affect the propriety of his DUI conviction.

13 Plaintiff’s motion in limine no. 1 is GRANTED. Defendants are precluded from
 14 presenting any evidence or argument regarding the toxicological test results, including that
 15 his blood alcohol level was reported to be 0.11 percent.

16 **2. Plaintiff’s Criminal History (Motion No. 2)**

17 Plaintiff moves to exclude evidence of his misdemeanor DUI conviction on the
 18 ground that it was not disclosed by Defendants with their initial disclosures, as required by
 19 Federal Rule of Civil Procedure 26(a). Alternatively, Plaintiff contends evidence of his
 20 conviction would be unduly prejudicial and is not otherwise the type of crime that may be
 21 used to impeach his credibility. Pl.’s Mot. at 1.

22 **a) *Compliance with Rule 26(a)***

23 Rule 26(a) imposes an affirmative duty on parties to disclose all individuals with
 24 potentially discoverable information, as well as all documents and tangible things that a

25 ⁶ Without discussion or citation to any legal authority, Plaintiff also complains that
 26 Defendants have not disclosed a witness to lay the foundation for the results or the chain of
 27 custody of the challenged blood samples. Pl.’s Mot. at 1. Defendants do not address this
 28 contention. Nonetheless, the Court notes that “[t]he possibility of a break in the chain of
 custody goes only to the weight of the evidence.” United States v. Harrington, 923 F.2d
 1371, 1374 (9th Cir. 1991).

1 party may use to support its claims or defenses. Fed. R. Civ. P. 26(a). Parties also have a
2 duty to provide supplemental disclosures when they learn of additional information that
3 should have been provided under Rule 26(a). Id. 26(e)(1). “Rule 37(c)(1) gives teeth to
4 these requirements by forbidding the use at trial of any information required to be disclosed
5 by Rule 26(a) that is not properly disclosed.” Yeti by Molly, Ltd. v. Deckers Outdoor
6 Corp., 259 F.3d 1101, 1106 (9th Cir. 2001). Where a party seeks to exclude evidence under
7 Rule 37(c)(1), the burden is on the party facing sanctions to establish that the lack of
8 compliance was harmless or substantially justified. Id. at 1107.

9 Defendants do not dispute that they failed to disclose any documents relating to
10 Plaintiff's conviction with their initial disclosures or offer any justification for their failure
11 to do so. Instead, Defendants posit that their failure to comply with Rule 26 is harmless
12 since the documents were listed in their trial exhibit list and with their oppositions to
13 Plaintiff's motions in limine. In neither his moving papers nor his reply does Plaintiff
14 claim that he suffered any prejudice resulting from Defendants' untimely disclosure of
15 documents pertaining to his conviction.⁷ As such, the Court finds that Defendants' failure
16 to comply with Rule 26(a) was harmless and that the exclusion of the documents is not
17 warranted as a sanction under Rule 37(c)(1). See *Yeti*, 259 F.3d at 1106.

b) *Undue Prejudice*

19 Alternatively, Plaintiff contends that allowing evidence of his DUI misdemeanor
20 conviction would be unduly prejudicial relative to its marginal probative value because it is
21 not germane to whether the CHP officers used excessive force during his detention at the
22 CHP office or had grounds to search his vehicle. Defendants respond that Plaintiff's
23 conviction is necessary to (1) prevent the jury from speculating that Plaintiff was not
24 prosecuted or convicted for DUI and (2) demonstrate that the officer had probable cause "to

1 pull over and ultimately arrest plaintiff for DUI.” Defs.’ Am. Opp’n at 4. Neither
 2 contention is persuasive.

3 To prevail on an excessive force claim under § 1983, a pretrial detainee must show
 4 the force purposely or knowingly used against him was objectively unreasonable. Kingsley
 5 v. Hendrickson, 135 S.Ct. 2466, 2472-73 (2015). “A court must make this determination
 6 from the perspective of a reasonable officer on the scene, including what the officer knew
 7 at the time, not with the 20/20 vision of hindsight.” Id. at 2473. As such, whether the
 8 officers had probable cause to arrest Plaintiff in the first instance or whether he was later
 9 convicted of a DUI is not probative of whether the officers’ use of force at the CHP Office
 10 was objectively reasonable. See id.; see also Sanford, 258 F.3d at 1120 (“Excessive force
 11 used after an arrest is made does not destroy the lawfulness of the arrest.”); see also Bailey
 12 v. Newland, 263 F.3d 1022, 1031 (9th Cir. 2001) (noting that probable cause is established
 13 when *at the time of the arrest* “the facts and circumstances within [the officers’] knowledge
 14 and of which they had reasonably trustworthy information were sufficient to warrant a
 15 prudent man in believing that the petitioner had committed or was committing an
 16 offense.”). Defendants’ remaining concerns regarding possible juror speculation can be
 17 accommodated through the use of an appropriate jury instruction, if necessary.⁸

18 Plaintiff’s motion in limine no. 2 is GRANTED. Defendants are precluded from
 19 presenting any evidence or argument regarding the fact that Plaintiff pled “no contest” to
 20 and suffered a conviction for a violation of California Vehicle Code § 23152(b).

21 **3. Expert Testimony (Motion No. 3)**

22 Plaintiff moves to preclude Defendants from offering expert testimony from the
 23 CHP officers regarding his level of intoxication on the ground that they “have not been
 24 proffered as experts to testify on such matters.” Mot. at 2. However, expert testimony is
 25 not necessarily required to show that Plaintiff was intoxicated. United States v. Mastberg,

26 ⁸ Plaintiff also contends—and Defendants do not dispute—that a misdemeanor DUI
 27 is not a crime involving dishonesty or a false statement. Fed. R. Evid. 609(a)(2).
 28 Therefore, evidence of Plaintiff’s misdemeanor conviction is not otherwise admissible for
 impeachment purposes. Id.

1 503 F.2d 465, 470 (9th Cir. 1974) (“[A] lay witness may state his opinion that a person
 2 appeared nervous or intoxicated.”). Further, Defendants did, in fact, disclose the officers as
 3 unretained experts on the matter of Plaintiff’s intoxication. Defs.’ Unretained Expert
 4 Witness Disclosure, Dkt. 72.

5 More problematic for Defendants is the *scope* of the proposed expert opinions.
 6 Officer Jeffers and Phillips will “offer an opinion based on their observations of [Plaintiff]
 7 objective signs and symptoms of intoxication and his poor performance on the Field
 8 Sobriety Tests, . . .” *Id.* Defendants also state that “all unretained expert witnesses will
 9 express an opinion of the amount of beer Mr. Baca would need to consume to achieve a
 10 blood ethyl alcohol level of 0.11 at the time his blood was drawn.” *Id.*; see also Defs.
 11 Witness List at 2 (same). With regard the latter opinion, the Court has ruled above that
 12 Defendants cannot present evidence or argument that Plaintiff’s blood alcohol level was
 13 0.11 percent, absent expert testimony to establish the reliability of that measurement. Since
 14 Defendants concede they lack such an expert, they cannot, by extension, proffer testimony
 15 from the officers regarding the number of beers that Plaintiff likely consumed to reach a
 16 0.11 percent blood alcohol level.

17 In sum, Plaintiff’s motion in limine no. 3 is GRANTED IN PART and DENIED IN
 18 PART. The motion is DENIED to the extent Plaintiff seeks to preclude the CHP officers
 19 from offering testimony regarding whether Plaintiff appeared to be intoxicated. Defendants
 20 may offer lay testimony based on the officers’ observations of Plaintiff, as well as expert
 21 opinion testimony, provided that the requisite foundation is laid, pursuant to Federal Rule
 22 of Evidence 702. The motion is GRANTED insofar as Defendants seek to present any
 23 testimony that Plaintiff’s blood alcohol level was 0.11 percent or the number of alcoholic
 24 drinks Plaintiff likely consumed prior to his arrest.

25 **B. DEFENDANTS’ MOTIONS IN LIMINE**

26 **1. Lost Income (Motion No. 1)**

27 Defendants move the Court to exclude any evidence regarding Plaintiff’s lost
 28 income damages on the ground that Plaintiff failed to identify lost income as an element of

1 his damages in his Rule 26 initial disclosures. Plaintiff acknowledges that his initial
 2 disclosure did not identify lost income as part of his claim for damages, but states that
 3 Defendants “had the full opportunity to depose Plaintiff regarding his lost income during
 4 his deposition.” Pl.’s Opp’n at 2, Dkt. 125. Perhaps so, but Plaintiff confirmed during his
 5 deposition that he is not seeking lost income as part of his damages. Defs.’ Mot. at 2
 6 (citing Pl.’s Depo. at 110:24-111:1), Dkt. 121.⁹ Given Plaintiff’s admitted failure to
 7 comport with his Rule 26 obligation to disclose evidence of lost wages, coupled with his
 8 representation that he is not pursuing such damages, the Court finds that it would be
 9 prejudicial to allow Plaintiff to present evidence or testimony at trial regarding his lost
 10 income. See Yeti by Molly, 259 F.3d at 1106.

11 Defendants’ motion in limine no 1 is GRANTED. Plaintiff is precluded from offering
 12 any evidence or argument regarding lost income resulting from Defendants’ alleged
 13 misconduct.

14 **2. Plaintiff’s Medical Costs (Motion No. 2)**

15 Defendants move to preclude Plaintiff from presenting evidence of his damages
 16 consisting of his medical care costs on the ground that he failed to provide a computation of
 17 his damages as part of his initial disclosures. Rule 26(a)(1)(A)(iii) requires each party to
 18 provide to the other party “a computation of each category of damages claimed by the
 19 disclosing party” Plaintiff does not dispute that he never provided such a
 20 computation, but argues that his failure to comply is harmless because the information is
 21 contained within the medical records already in their possession. However, a party cannot
 22 avoid its obligation to provide a damage calculation merely by producing records ostensibly
 23 containing such information. See Lancelot Investors Fund, L.P. v. TSM Holdings, Ltd.,
 24 No. 07 C 4023, 2008 WL 1883435, at *6 (N.D. Ill. Apr. 28, 2008) (“Rule 26 requires that
 25 the calculation be done by the party claiming damages, not its opponent, who under the
 26

27 ⁹ The Court notes that Defendants failed to provide excerpts of Plaintiff’s deposition
 28 transcript as an exhibit in support of their motions in limine. However, Plaintiff does not
 dispute Defendants’ characterization of his deposition testimony.

1 defendants' unsupportable theory is left to sift through extensive records of the defendants
 2 and guess at what the damage claim is.”).

3 Defendants' motion in limine no. 2 is GRANTED. Plaintiff is precluded from
 4 offering any evidence or argument regarding his medical costs resulting from Defendants'
 5 alleged misconduct.

6 **3. Plaintiff's Injury at Santa Rita Jail (Motion No. 3)**

7 Defendants move for exclusion of evidence of plaintiff's injury while at Santa Rita
 8 Jail (“Santa Rita”). Plaintiff states that he does not oppose this motion. Pl.'s Opp'n at 2.
 9 Accordingly, Defendants' motion in limine no. 3 is GRANTED. Plaintiff is precluded from
 10 offering any evidence or argument regarding any injuries he sustained while detained at
 11 Santa Rita.

12 **4. Evidence Invalidating DUI Conviction (Motion No. 4)**

13 Citing Heck, Defendants move to exclude evidence that would necessarily imply the
 14 invalidity of Plaintiff's DUI conviction, including, without limitation: “that there was no
 15 probable cause for plaintiff's arrest; that Plaintiff satisfactorily performed the FSTs; that
 16 Plaintiff's [blood alcohol concentration] was less than 0.11; and/or that Plaintiff was falsely
 17 arrested.” Defs.' Mot. at 2.¹⁰ As discussed above, Plaintiff's claims in this action do not
 18 challenge the validity of his DUI conviction. As such, the concerns underlying Heck are
 19 not implicated.

20 Defendants also contend that the aforementioned evidence is not relevant, since
 21 Plaintiff has affirmatively stated that he is *not* challenging the legality of his arrest. The
 22 Court agrees that since the legality of the arrest is not at issue, it would confuse the jury to
 23 hear evidence pertaining to whether his arrest was legal. See Fed. R. Evid. 403. For the
 24 same reasons, whether Plaintiff's blood alcohol level was below 0.11 percent is not
 25 relevant. What *is* relevant, however, is Plaintiff's conduct in relation to the officers, which,

26 ¹⁰ In his Trial Brief, Plaintiff does not allege that he satisfactorily performed the
 27 FSTs. Rather, he states that “neither Officer Phillips nor Officer Jeffers gave any indication
 28 that Plaintiff erred in the course of performing any of the requested tests.” Pl.'s Trial Brief
 at 1, Dkt. 59.

1 in turn, is informed by whether and to what extent he was intoxicated. Defendants maintain
 2 that Plaintiff was drunk and belligerent, and that their use of force was therefore reasonable
 3 and justified under the circumstances. Plaintiff claims the opposite and challenges the
 4 officers' credibility regarding their account of the events. Since the parties' credibility will
 5 play a key role in the trier of fact's assessment of the parties' respective credibility, the
 6 circumstances surrounding Plaintiff's arrest, including his performance of the FSTs, are
 7 admissible, even if the legality of his arrest is itself not at issue. See Santos v. Gates, 287
 8 F.3d 846, 853 (9th Cir. 2002) ("[P]olice misconduct cases almost always turn on a jury's
 9 credibility determinations.").

10 Defendants' motion in limine no. 5 is GRANTED IN PART and DENIED IN
 11 PART. Plaintiff is precluded from arguing that Defendants lacked probable cause for his
 12 arrest; that his blood alcohol level was less than 0.11 percent; or that he was falsely
 13 arrested. Plaintiff is not precluded from presenting testimony regarding the circumstances
 14 leading to his arrest, including his performance of the FSTs.

15 **5. Unlawful Nonconsensual Blood Draw (Motion No. 5)**

16 Defendants move to preclude Plaintiff from offering any evidence or making any
 17 argument "that the nonconsensual blood draw was unnecessary, unreasonable or unlawful."
 18 Defs.' Mot. at 4. According to Defendants, they had a legal right to extract a blood sample
 19 from Plaintiff by force based upon his refusal to take a breath or blood test. Id. In addition,
 20 Defendants assert that the FAC does not allege any claim that the nonconsensual blood
 21 draw itself violated his constitutional rights. Id. Plaintiff's response to Defendants' in
 22 limine motion is vague, conclusory and unhelpful. He states only that their characterization
 23 of his testimony is "not supported by any evidence" and "is false and misleading." Pls.'
 24 Opp'n at 3. He adds that "[t]he jury must determine whether the seizure of [his] blood was
 25 reasonable or unreasonable." Id.

26 Plaintiff's assertion that the jury must address the reasonableness of Defendants'
 27 "seizure" of his blood presupposes that a claim that the blood extraction violated Plaintiff's
 28 constitutional rights is, in fact, properly before the Court. A non-consensual extraction of

1 blood implicates the Fourth Amendment's protection against *unreasonable searches and*
 2 *seizures.* See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989);
 3 Schmerber v. California, 384 U.S. 757, 766-72 (1966). The pleadings allege no such claim.
 4 The first and second claims for relief in the FAC are for "Unlawful Search of Automobile"
 5 and "Use of Excessive Force," respectively. Dkt. 17.¹¹ No allegation or claim is made that
 6 the blood draw constituted an unreasonable search and seizure in violation of the Fourth
 7 Amendment. Consistent with the FAC, the parties' subsequently-filed Joint Case
 8 Management Statement characterizes the operative claims as follows: "Plaintiff alleges
 9 violations of the fourth amendment based on the search of his vehicle . . . and *excessive*
 10 *force* related to a forced blood draw after plaintiff's refusal to submit to a chemical test."
 11 Jt. Case Mgt. Stmt. at 2, Dkt. 35 (emphasis added). In his trial brief, however, Plaintiff
 12 alleges for the first time that the blood draw was illegal. Pl.'s Trial Brief at 5. However,
 13 Plaintiff cannot unilaterally add a new claim by alleging it in his trial brief, particularly
 14 where, as here, the deadline to amend the pleadings and to complete discovery have long
 15 since passed. See Order for Pretrial Preparation, Dkt. 43.

16 The fact that Plaintiff has not alleged a Fourth Amendment violation based on a
 17 nonconsensual blood draw does not ipso facto mean that the circumstances surrounding the
 18 extraction are irrelevant. To the contrary, the Ninth Circuit has held that those facts are
 19 pertinent to whether the amount of force used by Defendants was objectively reasonable.
 20 Hammer v. Gross, 932 F.2d 842, 845, 846 (9th Cir. 1991). In particular, a jury is entitled to
 21 consider (1) whether the individual was "actively resisting the extraction of his blood,"
 22 (2) the "severity of the crime at issue," (3) whether he posed an immediate threat to the
 23 safety of the officers or others, and (4) whether the officers "refused to respect a reasonable
 24 request to undergo a different form of testing. Id. (internal quotations and citations
 25

26 ¹¹ Within that claim, the pleadings allege that "Defendant Officers Phillips, Jeffers,
 27 Randall, Wilson, Rodgers and Sergeants Grimes and True, and numerous other unknown
 28 CHP Officers or employees, used excessive and deadly force against Plaintiff, which
 violates Plaintiff's Fourth Amendment rights to be free from unlawful and physically
 intrusive governmental conduct." FAC ¶45.

1 omitted). In view of these considerations, the reasonableness of Defendants' conduct,
 2 including whether the forcible extraction of Plaintiff's blood was called for under the
 3 circumstances, may appropriately be considered by the jury in assessing whether the
 4 amount of force used by Defendants at the time of the incident was objectively reasonable.
 5 Accordingly, Defendants' motion in limine no. 5 is DENIED.

6 **6. Undisclosed Evidence and Witnesses (Motion No. 6)**

7 Defendants move to preclude Plaintiff from calling and eliciting testimony from the
 8 following individuals disclosed on his witness list on the grounds that they were not listed
 9 in his Rule 26(1) initial disclosures: Christine Allen, MPT; Dr. Richard Baxter; Dr.
 10 Frederico Moure; and an unspecified treating physician at the Veteran's Administration.
 11 Defs.' Mot. at 4. Plaintiff does not dispute that he failed to disclose these individuals, as
 12 required by Rule 26, but states, unresponsively, that he will not rely on "any medical
 13 records not produced in discovery," other than recent records he anticipates receiving from
 14 the Veterans Administration, which he will produce to the defense as soon as he receives
 15 them. Given Plaintiff's failure to demonstrate that his non-compliance with his Rule 26
 16 obligations was substantially justified or harmless, the Court finds that exclusion of these
 17 witnesses is appropriate. See Yeti By Molly, 259 F.3d at 1106. Defendants' motion in
 18 limine no. 6 is GRANTED.

19 **7. Testimony Regarding Causation (Motion No. 7)**

20 Defendants move to preclude Plaintiff from offering any evidence that his injuries
 21 are *caused* by their alleged use of excessive force on the ground that he has not disclosed
 22 any experts to offer such testimony. Defendants fail to cite any statutory or decisional
 23 authority to support their request. Plaintiff inexplicably fails to respond to this motion.¹²
 24

25 ¹² In connection with Defendants' motion in limine no. 3, Plaintiff affirmatively
 26 stated his non-opposition to the motion. In the case of this motion, however, Plaintiff's
 27 response brief offers no response at all—suggesting that the failure to address the motion
 28 was inadvertent. While the Court does not countenance Plaintiff's counsel's apparent lack
 of diligence, it declines to grant a frivolous motion simply because opposing counsel has
 neglected to address it.

1 Expert testimony is necessary when lay persons are unable to make an informed
2 judgment without the benefit of such testimony. See Caro v. Calderon, 165 F.3d 1223,
3 1227 (9th Cir. 1999). Here, Plaintiff alleges that the officers present at the CHP Office
4 slammed his face on the concrete floor and repeatedly beat and kicked him on his head,
5 back, arms and legs. As such, Plaintiff obviously is in a position to testify about the pain
6 and injuries he sustained as a result of this alleged conduct. See Martin v. Siller, 17
7 Cal.App.2d 153, 158 (1936) (“Common reasoning tells us that if the eye strikes the end of a
8 pipe, and an injury to the eye results, expert testimony is unnecessary.”). In the event
9 Plaintiff attributes an injury to Defendants’ conduct that is the proper subject of expert
10 testimony, Defendants may interpose a trial objection at the appropriate time. E.g., Ely v.
11 Dick, No. 2:13-CV-2185-RSM) 2015 WL 1965263, at *3 ((W.D. Wash., Apr. 30, 2015)
12 (“Where an injury involves ‘obscure medical factors which are beyond an ordinary lay
13 person’s knowledge, necessitating speculation in making a finding,’ the plaintiff must
14 produce expert testimony to make this showing of a causal link between defendant’s
15 negligent act and the injury complained of.”). Defendants’ motion in limine no. 7 is
16 DENIED.

17 **III. CONCLUSION**

18 For the reasons set forth above,

19 IT IS HEREBY ORDERED THAT:

20 1. Plaintiff’s motion in limine no. 1 is GRANTED. Defendants are precluded
21 from presenting any evidence or argument regarding the toxicological test results, including
22 his blood alcohol level of 0.11 percent.

23 2. Plaintiff’s motion in limine no. 2 is GRANTED. Defendants are precluded
24 from presenting any evidence or argument regarding the fact that Plaintiff pled no contest
25 to and suffered a conviction for violating California Vehicle Code § 23152(b).

26 3. Plaintiff’s motion in limine no. 3 is GRANTED IN PART and DENIED IN
27 PART. The motion is DENIED to the extent Plaintiff seeks to preclude the CHP officers
28 from offering testimony regarding whether Plaintiff appeared to be intoxicated. Defendants

1 may offer lay testimony based on the officers' observations of Plaintiff, as well as expert
2 opinion testimony, provided that the requisite foundation is laid, pursuant to Federal Rule
3 of Evidence 702. The motion is GRANTED insofar as Defendants seek to present any
4 testimony that Plaintiff's blood alcohol level was 0.11 percent or the number of alcoholic
5 drinks Plaintiff likely consumed prior to his arrest.

6 4. Defendants' motion in limine no. 1 is GRANTED. Plaintiff is precluded from
7 offering any evidence or argument regarding lost wages resulting from Defendants' alleged
8 misconduct.

9 5. Defendants' motion in limine no. 2 is GRANTED. Plaintiff is precluded
10 from offering any evidence or argument regarding his medical costs resulting from
11 Defendants' alleged misconduct.

12 6. Defendants' motion in limine no. 3 is GRANTED. Plaintiff is precluded
13 from offering any evidence or argument regarding any injuries he sustained while detained
14 at Santa Rita.

15 7. Defendants' motion in limine no. 4 is DENIED.

16 8. Defendants' motion in limine no. 5 is GRANTED IN PART and DENIED IN
17 PART. Plaintiff is precluded from arguing that Defendants lacked probable cause for his
18 arrest; that his blood alcohol level was less than 0.11 percent; or that he was falsely
19 arrested. With regard to the FSTs, Plaintiff may testify that the officers did not inform him
20 that he erred in performing those tests.

21 9. Defendants' motion in limine no. 6 is GRANTED. Plaintiff is precluded
22 from presenting testimony at trial from: Christine Allen, MPT; Dr. Richard Baxter; Dr.
23 Frederico Moure; and an unspecified treating physician at the Veteran's Administration.

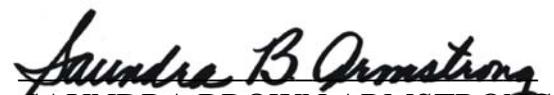
24 10. Defendants' motion in limine no. 7 is DENIED.

25 11. The action is REFERRED to Magistrate Judge Laurel Beeler to schedule a
26 further settlement conference in this action, to take place within 60 days of the date this
27 order is filed.

28

1 IT IS SO ORDERED.
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: 12/19/15


SAUNDRA BROWN ARMSTRONG
Senior United States District Judge